No. 87-897

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In The

Supreme Court of the United States

October Term, 1987

J.E. BERNARD & CO.,

Petitioner,

v.

THE INGERSOLL MILLING MACHINE COMPANY, M/V BODENA, her engines, boilers, etc., EXCELLENT MARINE, INC., TAIWAN INTERNATIONAL LINE LIMITED and FIREMAN'S FUND INSURANCE CO.,

Respondents.

REPLY BRIEF OF J.E. BERNARD & CO. IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

Page

REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO THE PETITION 1

INTRODUCTION 1

ARGUMENT 3

I. THERE WAS NO ALTERNATIVE BASIS FOR THE DISTRICT COURT TO EXERCISE JURISDICTION IN THIS CASE 3

A. Ingersoll's Complaint Failed To Allege Facts To Support A Finding Of Jurisdiction Based Upon Diversity Of Citizenship 3

B. This Case Is Not A Proper One For The Exercise Of Pendent Party Jurisdiction Since The Court Had No Independent Basis For Federal Jurisdiction Over Bernard 4

II. THE *MINTURN* RULE HAS BEEN APPLIED TO GENERAL AGENCY AGREEMENTS SUCH AS THE ONE HERE 6

CONCLUSION 7

APPENDIX 1a

Complaint of The Ingersoll Milling Machine Co. . 1a

Answer of J.E. Bernard & Co. 8a

TABLE OF AUTHORITIES

CASES: *Page*

Aldinger v. Howard, 427 U.S. 1 (1976) 4, 5

Continental Cameras Co., Inc. v. FOA & Son Corp., 658 F. Supp. 287 (S.D.N.Y. 1987), *aff'd*, 831 F.2d 45 (2d Cir. 1987) 6

Continental Cameras Co., Inc. v. FOA & Son Corp., 831 F.2d 45 (2d Cir. 1987) 2, 6

E.S. Binnings, Inc. v. M/V Saudi Riyadh, 815 F.2d 660 (11th Cir. 1987) 6

Gold Washing & Water Co. v. Keyes, 96 U.S. 199 (1878) 3

Harvey v. Hamilton, 155 Ill. 377 (1895) 5

Hinkins Steamship Agency, Inc. v. Freighters, Inc., 498 F.2d 411 (9th Cir. 1974) 6

Laughlin v. Hopkinson, 292 Ill. 80 (1920) 5

Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971) 4, 5

Minturn v. Maynard, 58 U.S. (17 How.) 477 (1855) 2, 6, 7

Morse Electro Products Corp. v. S.S. Great Peace, 437 F. Supp. 474 (D.N.J. 1977) 3

Musico v. Champion Credit Corp., 764 F.2d 102 (2d Cir. 1985) 3

Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp., 470 U.S. 1031 (1985) 2, 7

CASES: *Page*

Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp., 739 F.2d 798 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985) 7

T.N.T. Marine Service, Inc. v. Weaver Shipyards & Dry Docks, Inc., 702 F.2d 585 (5th Cir.), *cert. denied*, 464 U.S. 847 (1983) 6

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) . . . 4

Williams v. Shipping Corp. of India, Ltd., 354 F. Supp. 626 (S.D. Ga. 1973) 6

STATUTES:

28 U.S.C. § 1332(a) 3

28 U.S.C. § 1332(c) 3

28 U.S.C. § 1333(1) 5

ILL. REV. STAT. ch. 17 § 6402 5

MISCELLANEOUS:

J. Moore, *5 Moore's Federal Practice* ¶ 38.39 [1] (2d ed. 1987) 6

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INTRODUCTION

The Petitioner J.E. Bernard & Co. respectfully prays that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on September 14, 1987, and October 23, 1987. The Second

Circuit, *inter alia*, rejected Bernard's challenge to admiralty jurisdiction. Although no alternative bases for jurisdiction were raised below, Respondents now suggest that this Court reject Bernard's challenge to admiralty jurisdiction because, they argue, both diversity and pendent party jurisdiction exist. Contrary to Respondents' arguments, however, the pleadings demonstrate that the parties were not diverse. Moreover, to invoke pendent party jurisdiction at this late date would have the severe penalty of denying Bernard the right to a jury trial and of assessing Bernard with prejudgment interest.

Respondents further claim that *Minturn* does not apply to this case and thus there is no conflict among the circuits. To the contrary, had *Minturn* been properly followed in this case, the Second Circuit would have found Ingersoll's claim against Bernard to be outside the scope of admiralty jurisdiction. Instead the court below merely added to the conflict among the circuits. This conflict was recognized by Justice Blackmun in his dissent in *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 470 U.S. 1031, (1985) (Blackmun, J., dissenting). In addition, the Second Circuit has again contributed to the conflict with its recent decision in *Continental Cameras, Inc. v. FOA & Son Corp.*, 831 F.2d 45 (2d Cir. 1987). Accordingly, the question presented by Bernard's petition, whether a dispute involving documentation services performed under an agency agreement and ancillary to a maritime contract falls outside the scope of admiralty jurisdiction, is ripe for review.

ARGUMENT

I.

THERE WAS NO ALTERNATIVE BASIS FOR THE DISTRICT COURT'S EXERCISE OF JURISDICTION IN THIS CASE.

A. Ingersoll's Complaint Failed To Allege Facts To Support A Finding Of Jurisdiction Based Upon Diversity Of Citizenship.

Section 1332(a) of Title 28 of the United States Code grants district courts original jurisdiction in civil actions in which the amount in controversy exceeds $10,000 and the parties are citizens of different states. For diversity purposes, a corporation has dual citizenship; it is deemed a citizen of the state where it is incorporated and of the state where it has its principal place of business. 28 U.S.C. § 1332(c). The grounds for diversity jurisdiction must be stated on the face of the complaint. *Gold Washing & Water Co. v. Keyes*, 96 U.S. 199 (1878).

Ingersoll filed its complaint on July 14, 1980, alleging that both Ingersoll and Bernard were incorporated under the laws of the state of Illinois and that both Ingersoll and Bernard had their principal places of business in Illinois. *See* appendix to reply at 1a, *infra*. Bernard's answer, filed on August 26, 1980, admitted that Bernard indeed had its principal place of business in Illinois, but denied being incorporated under the laws of the state of Illinois. *See* appendix to reply at 8a, *infra*. Since both Ingersoll and Bernard had their principal places of business in Illinois, diversity was not complete. The pleadings themselves establish that the parties were not diverse.

Not only is Ingersoll's discussion of contrary facts dehors the record, but Ingersoll waived its right to challenge these jurisdictional facts by failing to do so below. *Musico v. Champion Credit Corp.*, 764 F. 2d 102, 108 (2d Cir. 1985). *See also Morse Electro Products Corp. v. S.S. Great Peace*, 437 F. Supp 474, 481 n. 9 (D.N.J. 1977);

Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800, 809 n. 10 (2d Cir. 1971). Even if Ingersoll could properly challenge these facts now, however, it fails to support its assertion that Bernard did not have its principal place of business in Illinois when this suit was filed. In its 1980 answer to Ingersoll's complaint, Bernard admitted that its principal place of business was in Elk Grove Village, Illinois. Moreover, as reflected in Bernard's amended application for authority to conduct business in Illinois, filed in 1982, Bernard's indicated that it considered Elk Grove Village, Illinois to be a principal place of business at that time. *See* appendix to Ingersoll's Response at 11a. Bernard's 1977 application for authority to transact business in Illinois simply does not demonstrate the facts as they existed in 1980, when this suit was filed. The facts in 1980 were as they were pleaded by Ingersoll; that both Ingersoll and Bernard had their principal places of business in Illinois in 1980. Accordingly, Ingersoll's complaint failed to allege facts to support its belated claim that the parties were diverse.

B. This Case Is Not A Proper One For The Exercise Of Pendent Party Jurisdiction Since The Court Had No Independent Basis For Federal Jurisdiction Over Bernard.

"[P]endent jurisdiction is a doctrine of discretion, not of plaintiff's right . . . ." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). In determining whether to exercise pendent jurisdiction, a court must consider judicial economy, convenience and fairness to the litigants. *Id.* It is unfair to a litigant to bring a purely state claim within the federal courts' jurisdiction when there exists, as here, no independent basis for federal jurisdiction over the party. *See Aldinger v. Howard*, 427 U.S. 1, 14 (1976); *Leather's Best, Inc.*, 451 F.2d at 811. In *Aldinger*, this Court affirmed the appellate court's refusal to:

> permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to join an entirely different defendant on the basis of a state law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant "derive[d] from a common nucleus of operative fact."

427 U.S. at 14.[1] Here, Ingersoll has no federal claims against Bernard and the parties are not diverse. Moreover, the liability of the parties named in the federal claims did not turn upon the conduct of Bernard. Requiring Ingersoll's state claim against Bernard to be tried with the federal claims solely through the exercise of pendent party jurisdiction would clearly be unfair to Bernard.

To determine, at this late stage, that pendent party jurisdiction existed below would similarly prejudice Bernard. Had Bernard's contract liability been pled by Ingersoll as a purely state claim, joined in a federal action through the exercise of pendent jurisdiction, Illinois law would have applied to the claim. Bernard would then have been entitled to a jury trial and, under Illinois law, would not have been liable for prejudgment interest. ILL. REV. STAT. ch. 17 § 6402. *See Harvey v. Hamilton*, 155 Ill. 377 (1895); *Laughlin v. Hopkinson*, 292 Ill. 80 (1920). Since this state claim was erroneously pleaded and embraced by admiralty jurisdiction, however, prejudgment interest was assessed against Bernard and, more importantly, Bernard was denied its right to a jury trial.

Ingersoll relies on *dicta* in *Leather's Best* to support its assertion that Bernard waived its right to a jury trial by failing to make a demand below. One cannot waive

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[1] This Court has yet to determine whether pendent party jurisdiction may even be employed with respect to a claim brought under 28 U.S.C. § 1333(1) to confer jurisdiction over a purely state claim.

that which was never ripe. Rule 38(b) provides for a jury demand only when such a right exists. *See* J. Moore, *5 Moore's Federal Practice* ¶ 38.39 [1] (2d ed. 1987). Regardless of whether Bernard had demanded a jury, therefore, its demand would have been stricken. *See Williams v. Shipping Corp. of India, Ltd.*, 354 F. Supp 626, 629-30 (S.D. Ga. 1973); *T.N.T. Marine Service, Inc. v. Weaver Shipyards & Dry Docks*, 702 F.2d 585, 587 (5th Cir.), *cert. denied*, 464 U.S. 847 (1983). Due to the significant implications of exercising pendent party jurisdiction, clearly this Court must find that the time for determining whether to exercise such jurisdiction has passed.

II

THE *MINTURN* RULE HAS BEEN APPLIED TO GENERAL AGENCY AGREEMENTS SUCH AS THE ONE HERE.

Contrary to Fireman Fund's assertion, the rule set forth in *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1855), that general agency contracts do not fall within the scope of admiralty jurisdiction, has been applied to agency contracts other than those for husbanding services. For example, in its recent decision in *E.S. Binnings, Inc. v. M/V Saudi Riyadh*, 815 F.2d 660 (11th Cir. 1987), the Eleventh Circuit distinguished the agency contract in that case from one that was solely for husbanding services. The court stated that, unlike the purely husbanding contract in *Hinkins Steamship Agency, Inc. v. Freighters, Inc.*, 498 F.2d 411 (9th Cir. 1974), which was found to be within the scope of admiralty jurisdiction, the agency contract in *Binnings* also called for the performance of documentation, cargo solicitation and accounting services. This general agency non-husbanding contract was therefore found to be outside the scope of admiralty jurisdiction. In *Continental Cameras Co., Inc v. FOA & Son Corp.*, 658 F. Supp. 287 (S.D.N.Y. 1987), the district court held that an agency agreement to procure a marine insurance contract did not

fall within admiralty jurisdiction. Although the district court did not specifically cite *Minturn*, the Second Circuit, in affirming, cited *Peralta (Shipping) Corp. v. Smith & Johnson Shipping Corp.*, 739 F.2d 798 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985), which relied solely on the *Minturn* rule in its analysis. *Continental Cameras Co., Inc. v. FOA & Son Corp.*, 831 F.2d 45 (2d Cir. 1987). These two cases, in addition to the language in the Second Circuit's opinion in the instant case, clearly demonstrate that the *Minturn* rule has been applied to general agents other than agents for husbanding services.

CONCLUSION

In *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 470 U.S. 1031 (1985), Justice Blackmun recognized the conflict among the circuits over the application of the *Minturn* rule governing admiralty jurisdiction over general agents. This case contributes to the conflict and is a worthy subject for Supreme Court review. For this reason, as well as the other reasons stated in Bernard's petition for certiorari, Bernard respectfully requests that its petition be granted.

Respectfully submitted,

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APPENDIX

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

THE INGERSOLL MILLING MACHINE COMPANY,
Plaintiff,

v.

J. E. BERNARD & CO., TAIWAN INTERNATIONAL LINE, LTD., and FIREMAN'S FUND INSURANCE CO.,
Defendants.

NO.

COMPLAINT

Plaintiff, The Ingersoll Milling Machine Company ("Ingersoll") complains against defendants, J. E. Bernard & Co. ("Bernard"), Taiwan International Line, Ltd. ("Taiwan Line") and Fireman's Fund Insurance Co. ("Fireman's fund") and alleges:

Parties and Jurisdiction

1. Plaintiff, Ingersoll, is a corporation incorporated under the law of the State of Illinois. It has its principal place of business in Rockford, Illinois and is in the business of making and selling machinery.

2. Defendant, Bernard, is a corporation incorporated under the laws of the State of Illinois. It has its principal place of business in Elk Grove Village, Illinois and is in the business of freight forwarding.

3. Defendant, Taiwan Line, is a corporation incorporated under the laws of the Republic of Taiwan. Taiwan Line owns and operates a number of vessels engaged in carrying cargo as a common carrier on the high seas, including

the M/V Bodena, which at all times hereinafter mentioned was a general ship engaged in the common carriage of merchandise for hire between, among others, the ports of New Orleans and Pusan, Korea.

4. Defendant, Fireman's Fund, is a corporation incorporated under the laws of the State of California. It has its principal place of business in San Francisco, California and is in the business of marine insurance.

5. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1333.

6. This is a case of cargo damage, civil and maritime, and is an admiralty and maritime claim within the meaning of Rule 9(h).

COUNT I

Plaintiff, Ingersoll, complains against defendant, Bernard, and alleges:

7-10. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1, 2, 5 and 6.

11. On or about July, 1979 Ingersoll entered into an agreement with Bernard pursuant to which Bernard was to act as the freight forwarder and arrange for safe shipment of horizontal spindle machinery from Rockford, Illinois to plaintiff's consignee in Korea.

12. The machinery packed in twenty boxes marked S.O. 24441 (the "machinery") left Ingersoll's factory in Rockford, Illinois in good order and condition approximately between August 29 and September 19, 1979.

13. The machinery arrived sometime thereafter in New Orleans in the same good order and condition and was placed in possession of Bernard, or its duly authorized agent.

14. Bernard had the duty to arrange for the safe loading and stowage of the machinery aboard the Bodena for its safe arrival in good condition in Pusan, Korea.

15. On or about September 27, 1979, the twenty boxes of machinery, in the same good order and condition, were loaded on board the Bodena and, without the authority or acquiescence of Ingersoll, were stowed "on deck" of the Bodena.

16. The Bodena sailed from New Orleans on September 27, 1979 to the destination port of Pusan, Korea.

17. Upon arrival in Pusan, Korea, on or about November 28, 1979, when the twenty boxes were discharged from the Bodena, it was found that the boxes were not in the same good order and condition as when delivered on board the Bodena and a great part of their contents had heavy rust, corrosion and other damage from exposure to the elements.

18. Bernard failed to perform its duties to prevent damage to the machinery and to ensure arrival of the machinery in good condition in Pusan by wrongfully permitting "on deck" stowage of the cargo.

19. Ingersoll has duly performed all valid conditions precedent to recovery on its part to be performed.

WHEREFORE, Ingersoll demands judgment against Bernard in the sum of $2,500,000, as well as interest and the costs of this litigation.

COUNT II

Plaintiff, Ingersoll, complains against defendant, Taiwan Line, and alleges:

20-26. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1, 3, 5, 6, 12, 13 and 15.

27. Taiwan Line received the machinery from Bernard on September 27, 1979.

28. On or about September 27, 1979, defendant received at the port of New Orleans, the 20 boxes of

machinery in good order and condition, to be carried from the port of New Orleans to the port of Pusan, Korea, there to be delivered in like good order and condition as when shipped, in consideration of an agreed freight.

29. Taiwan Line had the duty to ensure that the machinery be safely stowed and carried aboard the Bodena and to prevent damage to the cargo.

30. Plaintiff's cargo could only be carried safely "below deck". However, Taiwan Line breached its duty to ensure safe and appropriate stowage of the cargo, and without plaintiff's acquiescence or consent, wrongfully loaded, stowed and carried the cargo "on deck" aboard the M/V Bodena as evidenced by Bill of Lading No. 1, New Orleans/Pusan.

31. Ingersoll had no notice of the "on deck" stowage until receipt of a copy of the Bill of Lading prepared by Bernard and issued by the defendant, Taiwan Line after the vessel Bodena was well at sea.

32. Thereafter the vessel, having the machinery on board, sailed from the port of New Orleans and subsequently arrived at the port of Pusan, Korea where the Bodena discharged the machinery, not in like good order and condition as when delivered to the vessel and to the defendant at the port of New Orleans, but seriously injured and damaged by heavy rust, corrosion and other damage from exposure to the elements.

33. By reason of the premises the plaintiff has sustained damages in the sum of $2,500,000 as nearly as the same can now be estimated, no part of which has been paid although the same has been duly demanded.

34. Ingersoll has duly performed all valid conditions precedent to recovery on its part to be performed.

WHEREFORE, Ingersoll demands judgment against Taiwan Line, in the sum of $2,500,000 as well as interest and the costs of this litigation.

COUNT III

Plaintiff, Ingersoll, complains against defendant, Taiwan Line, and alleges:

35-40. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1, 3, 5, 6, 13 and 15.

41. Thereafter the defendant loaded the machinery on board the Bodena at New Orleans, and the vessel, having the machinery on board, sailed from the port of New Orleans for Pusan, Korea, the contractual port of discharge of the cargo. During the course of the boyage [sic], however, on the orders of the defendant, the vessel improperly and unjustifiably deviated from her proper course to the port of Pusan and put in at certain ports located on the east coast of the United States and other ports. During the course of such unjustifiable deviation, the machinery referred to in the complaint was damaged.

42. The plaintiffs repeat and reallege each and every allegation contained in paragraphs 33 and 34 of the first cause of action.

WHEREFORE, Ingersoll demands judgment against Taiwan Line, in the sum of $2,500,000 as well as interest and the costs of this litigation.

COUNT IV

Plaintiff, Ingersoll, complains against defendant, Fireman's Fund, and alleges:

43-51. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1, 4, 5, 6, 11, 12, 15, 16 and 17.

52. On or about August 20, 1979, by a marine certificate No. 442423, dated the same date, in in consideration of the agreed premium which has been duly paid by the plaintiff, the defendant insured the plaintiff herein, on twenty boxes of machinery in the sum of $2,108,000, which sum was agreed value of the merchandise to be shipped on board

the Bodena at and from New Orleans to Pusan, Korea. The insurance attached from the time the goods insured left the factory of the plaintiff and covered thereafter while at risk of the assured, in due course of shipment, until delivered at store or warehouse of the consignee at destination. A copy of the marine certificate No. 422423 is hereto annexed and made a part of this complaint and marked Exhibit "A".

53. On or about September 27, 1979, the twenty boxes of machinery were duly laden on board the vessel Bodena and that ship proceeded on her voyage from the port of New Orleans to the port of Pusan, Korea. When the twenty boxes were discharged from the vessel Bodena, it was found that the cases and crates were not in the same good order and condition as when delivered to the steamship but were in a severely rusted and corroded condition, and a great part of their contents were damaged.

54. The plaintiff duly filed claim with defendant for the value of the machinery damaged during the voyage but the defendant declined the claim and has since refused to pay the same or any part thereof.

55. At the time of the commencement of this risk and thereafter until the loss, the plaintiff was the owner of the insured cargo and has suffered damages in the sum of $2,500,000, as nearly as can be ascertained at this time.

56. The plaintiff has complied with and duly performed all the conditions of the marine certificate on its part to be performed, and duly advised the duly authorized agents of the insurers of the loss promptly.

57. No part of the sum of $2,500,000 has been paid, although duly demanded by the plaintiff, and by reason of the premises such sum is now due and owing from the defendant to the plaintiff with interest thereon from November 28, 1979.

WHEREFORE, Ingersoll demands judgment against Fireman's Fund in the sum of $2,500,000 as well as interest and costs of this litigation.

THE INGERSOLL MILLING MACHINE COMPANY

By: /s/ JOSEPH KEIG, JR.
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Defendants.

No. 80 C 3576

ANSWER TO COMPLAINT

J.E. BERNARD & CO. ("Bernard") answers plaintiff's Complaint as follows:

1. It is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1.

2. It denies the allegations of the first sentence of paragraph 2. It admits that its principal place of business is in Elk Grove Village, Illinois. It admits that at some times it has performed in the business of freight forwarding. It denies the remaining allegations of paragraph 2.

3. It is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 3.

4. It is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 4.

5. It admits that paragraph 5 purports to invoke this Court's jurisdiction pursuant to 28 U.S.C. §1333, but denies

the remaining allegations of paragraph 5.

6. It admits that paragraph 6 purports to classify this as an admiralty and maritime claim within the meaning of Rule 9 (h), but denies the remaining allegations of paragraph 6.

COUNT I

7-10. It repeats and realleges each and every answer contained in paragraphs 1, 2, 5 and 6 as though fully set forth herein.

11. It denies the allegations of paragraph 11.

12. It is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 12.

13. It denies the allegations of paragraph 13.

14. It denies the allegations of paragraph 14.

15. It denies the allegations of paragraph 15.

16. It is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16.

17. It is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 17.

18. It denies the allegations of paragraph 18.

19. It denies the allegations of paragraph 19.

WHEREFORE, Defendant, J.E. BERNARD & COMPANY, denies that plaintiff, THE INGERSOLL MILLING MACHINE COMPANY, is entitled to judgment in any amount whatsoever.

that which was never ripe. Rule 38(b) provides for a jury demand only when such a right exists. *See* J. Moore, *5 Moore's Federal Practice* ¶ 38.39 [1] (2d ed. 1987). Regardless of whether Bernard had demanded a jury, therefore, its demand would have been stricken. *See Williams v. Shipping Corp. of India, Ltd.*, 354 F. Supp 626, 629-30 (S.D. Ga. 1973); *T.N.T. Marine Service, Inc. v. Weaver Shipyards & Dry Docks*, 702 F.2d 585, 587 (5th Cir.), *cert. denied*, 464 U.S. 847 (1983). Due to the significant implications of exercising pendent party jurisdiction, clearly this Court must find that the time for determining whether to exercise such jurisdiction has passed.

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THE *MINTURN* RULE HAS BEEN APPLIED TO GENERAL AGENCY AGREEMENTS SUCH AS THE ONE HERE.

Contrary to Fireman Fund's assertion, the rule set forth in *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1855), that general agency contracts do not fall within the scope of admiralty jurisdiction, has been applied to agency contracts other than those for husbanding services. For example, in its recent decision in *E.S. Binnings, Inc. v. M/V Saudi Riyadh*, 815 F.2d 660 (11th Cir. 1987), the Eleventh Circuit distinguished the agency contract in that case from one that was solely for husbanding services. The court stated that, unlike the purely husbanding contract in *Hinkins Steamship Agency, Inc. v. Freighters, Inc.*, 498 F.2d 411 (9th Cir. 1974), which was found to be within the scope of admiralty jurisdiction, the agency contract in *Binnings* also called for the performance of documentation, cargo solicitation and accounting services. This general agency non-husbanding contract was therefore found to be outside the scope of admiralty jurisdiction. In *Continental Cameras Co., Inc v. FOA & Son Corp.*, 658 F. Supp. 287 (S.D.N.Y. 1987), the district court held that an agency agreement to procure a marine insurance contract did not

fall within admiralty jurisdiction. Although the district court did not specifically cite *Minturn*, the Second Circuit, in affirming, cited *Peralta (Shipping) Corp. v. Smith & Johnson Shipping Corp.*, 739 F.2d 798 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985), which relied solely on the *Minturn* rule in its analysis. *Continental Cameras Co., Inc. v. FOA & Son Corp.*, 831 F.2d 45 (2d Cir. 1987). These two cases, in addition to the language in the Second Circuit's opinion in the instant case, clearly demonstrate that the *Minturn* rule has been applied to general agents other than agents for husbanding services.

CONCLUSION

In *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 470 U.S. 1031 (1985), Justice Blackmun recognized the conflict among the circuits over the application of the *Minturn* rule governing admiralty jurisdiction over general agents. This case contributes to the conflict and is a worthy subject for Supreme Court review. For this reason, as well as the other reasons stated in Bernard's petition for certiorari, Bernard respectfully requests that its petition be granted.

Respectfully submitted,

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1. Plaintiff, Ingersoll, is a corporation incorporated under the law of the State of Illinois. It has its principal place of business in Rockford, Illinois and is in the business of making and selling machinery.

2. Defendant, Bernard, is a corporation incorporated under the laws of the State of Illinois. It has its principal place of business in Elk Grove Village, Illinois and is in the business of freight forwarding.

3. Defendant, Taiwan Line, is a corporation incorporated under the laws of the Republic of Taiwan. Taiwan Line owns and operates a number of vessels engaged in carrying cargo as a common carrier on the high seas, including

the M/V Bodena, which at all times hereinafter mentioned was a general ship engaged in the common carriage of merchandise for hire between, among others, the ports of New Orleans and Pusan, Korea.

4. Defendant, Fireman's Fund, is a corporation incorporated under the laws of the State of California. It has its principal place of business in San Francisco, California and is in the business of marine insurance.

5. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1333.

6. This is a case of cargo damage, civil and maritime, and is an admiralty and maritime claim within the meaning of Rule 9(h).

COUNT I

Plaintiff, Ingersoll, complains against defendant, Bernard, and alleges:

7-10. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1, 2, 5 and 6.

11. On or about July, 1979 Ingersoll entered into an agreement with Bernard pursuant to which Bernard was to act as the freight forwarder and arrange for safe shipment of horizontal spindle machinery from Rockford, Illinois to plaintiff's consignee in Korea.

12. The machinery packed in twenty boxes marked S.O. 24441 (the "machinery") left Ingersoll's factory in Rockford, Illinois in good order and condition approximately between August 29 and September 19, 1979.

13. The machinery arrived sometime thereafter in New Orleans in the same good order and condition and was placed in possession of Bernard, or its duly authorized agent.

14. Bernard had the duty to arrange for the safe loading and stowage of the machinery aboard the Bodena for its safe arrival in good condition in Pusan, Korea.

15. On or about September 27, 1979, the twenty boxes of machinery, in the same good order and condition, were loaded on board the Bodena and, without the authority or acquiescence of Ingersoll, were stowed "on deck" of the Bodena.

16. The Bodena sailed from New Orleans on September 27, 1979 to the destination port of Pusan, Korea.

17. Upon arrival in Pusan, Korea, on or about November 28, 1979, when the twenty boxes were discharged from the Bodena, it was found that the boxes were not in the same good order and condition as when delivered on board the Bodena and a great part of their contents had heavy rust, corrosion and other damage from exposure to the elements.

18. Bernard failed to perform its duties to prevent damage to the machinery and to ensure arrival of the machinery in good condition in Pusan by wrongfully permitting "on deck" stowage of the cargo.

19. Ingersoll has duly performed all valid conditions precedent to recovery on its part to be performed.

WHEREFORE, Ingersoll demands judgment against Bernard in the sum of $2,500,000, as well as interest and the costs of this litigation.

COUNT II

Plaintiff, Ingersoll, complains against defendant, Taiwan Line, and alleges:

20-26. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1, 3, 5, 6, 12, 13 and 15.

27. Taiwan Line received the machinery from Bernard on September 27, 1979.

28. On or about September 27, 1979, defendant received at the port of New Orleans, the 20 boxes of

machinery in good order and condition, to be carried from the port of New Orleans to the port of Pusan, Korea, there to be delivered in like good order and condition as when shipped, in consideration of an agreed freight.

29. Taiwan Line had the duty to ensure that the machinery be safely stowed and carried aboard the Bodena and to prevent damage to the cargo.

30. Plaintiff's cargo could only be carried safely "below deck". However, Taiwan Line breached its duty to ensure safe and appropriate stowage of the cargo, and without plaintiff's acquiescence or consent, wrongfully loaded, stowed and carried the cargo "on deck" aboard the M/V Bodena as evidenced by Bill of Lading No. 1, New Orleans/Pusan.

31. Ingersoll had no notice of the "on deck" stowage until receipt of a copy of the Bill of Lading prepared by Bernard and issued by the defendant, Taiwan Line after the vessel Bodena was well at sea.

32. Thereafter the vessel, having the machinery on board, sailed from the port of New Orleans and subsequently arrived at the port of Pusan, Korea where the Bodena discharged the machinery, not in like good order and condition as when delivered to the vessel and to the defendant at the port of New Orleans, but seriously injured and damaged by heavy rust, corrosion and other damage from exposure to the elements.

33. By reason of the premises the plaintiff has sustained damages in the sum of $2,500,000 as nearly as the same can now be estimated, no part of which has been paid although the same has been duly demanded.

34. Ingersoll has duly performed all valid conditions precedent to recovery on its part to be performed.

WHEREFORE, Ingersoll demands judgment against Taiwan Line, in the sum of $2,500,000 as well as interest and the costs of this litigation.

COUNT III

Plaintiff, Ingersoll, complains against defendant, Taiwan Line, and alleges:

35-40. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1, 3, 5, 6, 13 and 15.

41. Thereafter the defendant loaded the machinery on board the Bodena at New Orleans, and the vessel, having the machinery on board, sailed from the port of New Orleans for Pusan, Korea, the contractual port of discharge of the cargo. During the course of the boyage [sic], however, on the orders of the defendant, the vessel improperly and unjustifiably deviated from her proper course to the port of Pusan and put in at certain ports located on the east coast of the United States and other ports. During the course of such unjustifiable deviation, the machinery referred to in the complaint was damaged.

42. The plaintiffs repeat and reallege each and every allegation contained in paragraphs 33 and 34 of the first cause of action.

WHEREFORE, Ingersoll demands judgment against Taiwan Line, in the sum of $2,500,000 as well as interest and the costs of this litigation.

COUNT IV

Plaintiff, Ingersoll, complains against defendant, Fireman's Fund, and alleges:

43-51. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1, 4, 5, 6, 11, 12, 15, 16 and 17.

52. On or about August 20, 1979, by a marine certificate No. 442423, dated the same date, in in consideration of the agreed premium which has been duly paid by the plaintiff, the defendant insured the plaintiff herein, on twenty boxes of machinery in the sum of $2,108,000, which sum was agreed value of the merchandise to be shipped on board

the Bodena at and from New Orleans to Pusan, Korea. The insurance attached from the time the goods insured left the factory of the plaintiff and covered thereafter while at risk of the assured, in due course of shipment, until delivered at store or warehouse of the consignee at destination. A copy of the marine certificate No. 422423 is hereto annexed and made a part of this complaint and marked Exhibit "A".

53. On or about September 27, 1979, the twenty boxes of machinery were duly laden on board the vessel Bodena and that ship proceeded on her voyage from the port of New Orleans to the port of Pusan, Korea. When the twenty boxes were discharged from the vessel Bodena, it was found that the cases and crates were not in the same good order and condition as when delivered to the steamship but were in a severely rusted and corroded condition, and a great part of their contents were damaged.

54. The plaintiff duly filed claim with defendant for the value of the machinery damaged during the voyage but the defendant declined the claim and has since refused to pay the same or any part thereof.

55. At the time of the commencement of this risk and thereafter until the loss, the plaintiff was the owner of the insured cargo and has suffered damages in the sum of $2,500,000, as nearly as can be ascertained at this time.

56. The plaintiff has complied with and duly performed all the conditions of the marine certificate on its part to be performed, and duly advised the duly authorized agents of the insurers of the loss promptly.

57. No part of the sum of $2,500,000 has been paid, although duly demanded by the plaintiff, and by reason of the premises such sum is now due and owing from the defendant to the plaintiff with interest thereon from November 28, 1979.

WHEREFORE, Ingersoll demands judgment against Fireman's Fund in the sum of $2,500,000 as well as interest and costs of this litigation.

THE INGERSOLL MILLING MACHINE COMPANY

By: /s/ JOSEPH KEIG, JR.
Joseph Keig, Jr.
One of the Attorneys for Plaintiff

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THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE INGERSOLL MILLING MACHINE COMPANY,
Plaintiff,

vs.

J. E. BERNARD & CO., TAIWAN INTERNATIONAL LINE, LTD., and FIREMAN'S FUND INSURANCE CO.,
Defendants.

No. 80 C 3576

ANSWER TO COMPLAINT

J.E. BERNARD & CO. ("Bernard") answers plaintiff's Complaint as follows:

1. It is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1.

2. It denies the allegations of the first sentence of paragraph 2. It admits that its principal place of business is in Elk Grove Village, Illinois. It admits that at some times it has performed in the business of freight forwarding. It denies the remaining allegations of paragraph 2.

3. It is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 3.

4. It is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 4.

5. It admits that paragraph 5 purports to invoke this Court's jurisdiction pursuant to 28 U.S.C. §1333, but denies

the remaining allegations of paragraph 5.

6. It admits that paragraph 6 purports to classify this as an admiralty and maritime claim within the meaning of Rule 9 (h), but denies the remaining allegations of paragraph 6.

COUNT I

7-10. It repeats and realleges each and every answer contained in paragraphs 1, 2, 5 and 6 as though fully set forth herein.

11. It denies the allegations of paragraph 11.

12. It is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 12.

13. It denies the allegations of paragraph 13.

14. It denies the allegations of paragraph 14.

15. It denies the allegations of paragraph 15.

16. It is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16.

17. It is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 17.

18. It denies the allegations of paragraph 18.

19. It denies the allegations of paragraph 19.

WHEREFORE, Defendant, J.E. BERNARD & COMPANY, denies that plaintiff, THE INGERSOLL MILLING MACHINE COMPANY, is entitled to judgment in any amount whatsoever.

BEST AVAILABLE COPY

COUNTS II, III and IV

Counts II, III and IV are not directed against this defendant.

/s/ H. RODERIC HEARD

One of the Attorneys for Defendant
J. E. BERNARD & CO.

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